ZAIBUN SA SYED AHMAD

v.

LOH KOON MOY & ANOR.

PRIVY COUNCIL
LORD DIPLOCK
LORD ELWYN-JONES
LORD RUSSELL OF KILLOWEN
LORD KEITH OF KINKEL
LORD BRANDON OF OAKBROOK
[APPEAL NO. 27 OF 1980]
20 APRIL 1982

CONTRACT: *Specific performance - Sale/purchase agreement - Breach of - No mention of parties obligations - Effect - Claim for specific performance and further or alternatively damages for breach of contract - Whether Court entitled to exercise its discretion to order specific performance ss. 11(1)(2), 19 Specific Relief Act 1950 - Section 92 Evidence Act 1950.*

This was an appeal by the vendor of a sale/purchase agreement dated 11 December 1973 against the decision of the Federal Court of Malaysia which reversed the decision of the trial judge who awarded damages to the purchaser/respondent and instead ordered specific performance of the said agreement. The claim filed at the High Court was for specific performance of the agreement requiring the vendor/appellant to transfer the land to the purchaser/respondent and further or alternatively damages for breach of contract.

The real question was whether the trial Judge was right to refuse specific performance.

Held:

[1] The claim for relief was for specific performance of the agreement and further or alternatively damages for breach of contract - a perfectly usual claim which cannot be taken as indicating an alternative equally acceptable to the plaintiff.

[2] If the learned trial Judge thought that the fixing of the sum of RM5,000 deprived him of jurisdiction to order specific performance he appears to have ignored s. 19 of the Specific Relief Act.

[3] Accordingly, the Federal Court was entitled to exercise its discretion and in their Lordships' opinion was correct in reversing the decision of the Judge and ordering specific performance.

[Appeal dismissed with costs.]

Legislation referred to:
Evidence Act 1950, s. 92(b)
Specific Relief Act 1950, ss. 11(1), (1)(c), (2), 19

JUDGMENT

Lord Russell of Killowen:

This appeal from the Federal Court of Malaysia, arises from an action by the respondents as purchasers against the appellant as vendor for specific performance of a contract dated 11 December 1973 for the sale and purchase of land in the Mukim of Serdang in the district of Bandar Bahru a price of RM1,100 per relong, the total purchase price being some RM75,000.

The action was in its face a normal one for specific performance requiring the vendor (present appellant) to transfer the land to the purchaser in fact Loh Koon Moy, Lam Wai Kee having acted on her behalf. The claim for relief was for specific performance of the agreement and further or alternatively damages for breach of contract - a perfectly usual claim which cannot be taken as indicating equally acceptable to the plaintiff. The vendor put in a defence which raised a number of points on all of which she failed. In the middle of cross-examination of Lam Wai Kee an amendment of the defence was permitted raising yet another plea on which the vendor also failed. Their Lordships do not find it necessary to comment on these failed points, except to remark that, insofar as they raised questions of fact upon which evidence conflicted, that given on behalf of the vendor was rejected by the Judge.

The agreement for sale was in no way remarkable: it provided for repayment by the purchaser of a deposit and part payment of RM5,000, which was then paid by cheque the receipt of which was then acknowledged. As emerges the vendor appellant did not in fact cash the cheque.

After the amendment to the defence already mentioned the cross-examination of Lam Wai Kee continued. The Judge's notes contain the following passage:

> I agree that there is no mention in the agreement if either the purchaser does not pay the balance of the purchase price or the vendor should refuse to sell, what should the consequence be. As a businessman I agree if the purchaser fails to pay the balance of the purchase price the deposit will be forfeited. There was such understanding to the said agreement. There was no undertaking that the vendor has to pay double the amount of deposit if she fails to abide by the agreement. But she has to pay all the damages. The RM5,000 deposit would also be refunded. These undertakings are not incorporated in the agreement. It is not mentioned in the agreement that the vendor must sell and the purchaser must buy.

This passage suggests that in some form the content of an alleged contemporaneous oral agreement, which would or might stand in the way of an order for specific performance, was being suggested to the witness. But the witness appears (i) only to have said as a generalisation that a defaulting purchaser loses his deposit, which is quite correct but does not touch on the fact that such a purchaser can also be ordered specifically to perform by paying the balance of the purchase price, (ii) to have expressly denied that if the vendor defaulted she was to pay double the amount of the deposit: she would have to pay all the damages and refund the deposit - which is only one possibility of a vendor's default and contains no reference to specific performance either as excluded by a contemporaneous oral agreement or otherwise.

The vendor herself gave evidence, it was not suggested to her that there was any contemporaneous oral agreement touching the question of specific performance, though she had said that Lam Wai Kee had explained the agreement to her she was not however present when the agreement was signed, Lam Wai Kee signing on her behalf.

The first defence witness, Gohar Iman Bin Abdul Rahim Moghal, was the husband of the vendor. He stated in evidence in chief that he was present at the signing of the agreement, with the vendor, a brother of the vendor, and Lam Wai Kee after

stating correctly that the written agreement did not contain any terms covering default by either party, he continued "There was an understanding should the second plaintiff (sic: but presumably meaning the purchaser) fail to abide by the said agreement the RM5,000 (the deposit) would be forfeited, plus damages, and if the defendant refused to sell, she has to refund the RM5,000 already paid plus an additional RM5,000".

The vendor gave evidence. She said in chief:

Apart from what is written in the agreement, there was a verbal agreement to the effect that should the purchaser not wish to buy the property in question the amount deposited i.e. RM5,000 would be forfeited. Should the vendor not sell the property then he will have to repay double the amount, i.e. RM10,000. The vendor has to return the RM5,000 and pay me another RM5,000.

The third defence witness, Abdul Rashid Bin Syed Ahmad, brother of the vendor, said nothing on those lines in chief, but in the course of his cross-examination said:

> There was also a verbal agreement between them and if we (i.e. vendor) refused to sell the land we have to pay double amount of deposit to the purchaser and when the purchaser refused to buy the deposit would be forfeited.

There was no challenge in cross-examination to this evidence introduced on behalf of the vendor. This is not surprising since no such oral agreement was ever pleaded, as of course it should have been. However the case has proceeded as far as this board without that point apparently being taken, and their Lordships are unwilling in those circumstances to dismiss this appeal on a pleading point. It is however legitimate to note that the lack of cross-examination cannot in the circumstances be taken as tantamount to acceptance by the purchaser of the evidence. It is also to be observed that the evidence of all three was that if, the vendor defaulted the vendor would have to pay RM5,000 and return the deposit of RM5,000 The evidence of the vendor and her brother was that if the purchaser defaulted the deposit would be forfeited, but the husband said in those circumstances the deposit would be forfeited and the purchaser would have to pay damages.

One thing is plain nobody gave evidence that there was an oral agreement that neither vendor nor purchaser would claim specific performance of the written agreement.

Section 11(1) of the Specific Relief Act provides:

Except as otherwise provided in this Chapter, the specific performance of any contract may, in the discretion of the Court, be enforced:

> (c) When the act agreed to be done is such that pecuniary compensation for its non-performance would not afford adequate relief.

Section 11(2) provides:

Unless and until the contrary is proved, the Court shall presume that the breach of a contract to transfer immovable property cannot be adequately relieved by a compensation in money, and that the breach of a contract to transfer movable property can be thus relieved.

Pausing there it is plain that the instant case if eminently one which required the exercise of the discretionary ability to order specific performance at the purchaser's suit not only was there the requirement of a contract of sale of immovable property

leading to a presumption by the Court "unless and until the contrary is proved" that s. 11(1) (c) was applicable: additionally there was no sustainable objection that at any stage the conduct of the purchaser was such as to disentitle her to equitable relief and further the evidence was that the land in question for use in association with her neighbouring tin mining operations, in particular the deposit of tailings.

What is there to the contrary? The learned Judge considered that a contemporaneous oral agreement served to prove that the vendor's breach of this contract to transfer immovable property could be adequately relieved by compensation in money, which displaced the presumption required of the Court by s. 11(2), and made s. 11(1)(c) inapplicable. He held that s. 92 proviso (b) of the Evidence Act applied to save the agreement's admissibility: a point which their Lordships do not find is necessary to approve or disapprove. The vendor's evidence on this oral agreement was, the Judge said, corroborated by her husband if that is limited to what was to happen on a vendor's default well and good but it was not in relation to a purchaser's default. The Judge said further that it was substantiated by the evidence of Lam Wai Kee already quoted. Their Lordships can only agree with the Federal Court that it was not so substantiated. The Judge went on to find that the oral agreement was that, in the event of default by the purchaser, the deposit would be forfeited plus damages only the vendor's husband said that and that in the event of default by the vendor she would have to refund the deposit and pay additionally RM5,000.

Their Lordships are uncertain what ultimate conclusion the Judge arrived at in deciding not to order specific performance. In the event he decided that the vendor must repay the deposit plus another RM5,000 but since the deposit cheque had not been cashed that came to RM5,000. He then proceeded to award a further RM5,700 under the further or alternative claim for "Damages" - a total therefore of RM10,700. It looks as though the Judge was treating the RM5,000 as something which the vendor had agreed (if she defaulted) to pay in consideration of the purchaser agreeing not to claim specific performance and to claim only damages. But no evidence came anywhere near that.

The real question however is whether the judge was right to refuse specific performance. If he thought that the fixing of the sum of RM5,000 deprived him of jurisdiction to order specific performance he appears to have ignored s. 19 of the Specific Relief Act, the terms of which are as follows:

> A contract, otherwise proper to be specifically enforced, may be so enforced, though a sum be named in it as the amount to be paid in case of its breach, and the party in default is willing to pay the same.

If the Judge considered he had jurisdiction to order specific performance but declined in the exercise of discretion to order it, he certainly in one respect took into consideration a wholly irrelevant matter - for in leading to a conclusion that "specific performance ought not to be granted" he started the sentence "Taking into consideration the alternative prayers of the plaintiffs in their pleadings ...". The common place fact of an alternative claim for damages in an action by a purchaser for specific performance of a contract for the sale of land cannot conceivably be a fact relevant to the exercise of the discretion. Accordingly the Federal Court was entitled to exercise its discretion and in their Lordships' opinion was correct in reversing the decision of the Judge and ordering specific performance.

a Accordingly the appeal must be dismissed with costs, and their Lordships advise His Majesty the Yang di-Pertuan Agong accordingly.

Also found at [1982] CLJ 457

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